

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

L.R.s of Allahdeen Vs The Board of Revenue & Ors.
(D.B.CIVIL SPECIAL APPEAL NO.162/2003)

D.B. Civil SPECIAL APPEAL UNDER
SECTION 18 OF THE RAJASTHAN HIGH
COURT ORDINANCE, 1949 AGAINST THE
ORDER DATED 18.11.2002 PASSED BY
LEARNED SINGLE JUDGE IN S.B.CIVIL
WRIT PETITION NO.6041/1993.

Date of Judgment: September 7th , 2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR

HON'BLE MR.JUSTICE R.P.VYAS

Mr.A.K.Singh for the appellants

Mr.Anil Bhandari, for the respondents

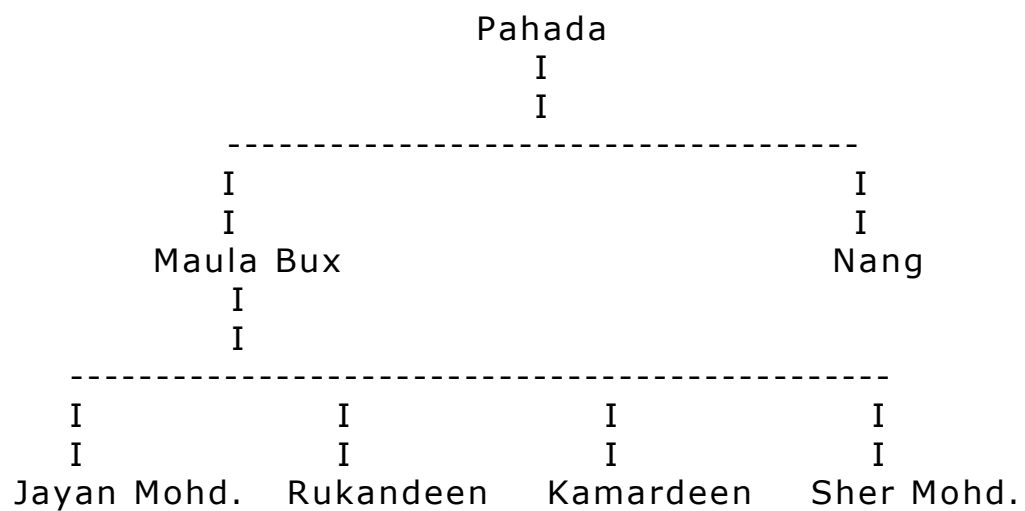
BY THE COURT: (PER HON'BLE MR.MATHUR J.)

REPORTABLE/-

1. This special appeal is directed against the judgment of the learned Single Judge dated 18th November, 2002 refusing to interfere with the order of the Board of Revenue directing the trial court to frame specific issue about the prevailing of custom of adoption amongst Muslims of Tara Nagar and decide the same after giving opportunity to both the parties for

leading evidence regarding the issue and decide the same afresh in the suit filed by the 4th respondent Jayan Mohd. in the year 1972.

2. The following pedigree table will assist in understanding the facts of the case:-



Phada had two sons namely Maula Bux and Nanag. Maula Bux had five sons namely Jayan Mohd. plaintiff, Rukandeen, Sher Mohd., Kamardeen and contesting defendant Allahdeen. The appellants are the legal representatives of Allahdeen.

Maula Bux died in Samvat Year 2027 and therefore, the 4th respondent Jayan Mohd. filed a suit in the court of Assistant Collector, Rajgarh for partition of the agricultural land alleged to be the Khatedari land of

Maula Bux. The particulars of the land are given as under:-

- (i) Land falling in Khasra No.122 – 23 Bigha 8 Biswa
- (ii) Land falling in Khasra No.123 – 8 Bigha 1 Biswa
(both lands falling in Taranagar)
- (iii) Land falling in Khasra No.93 – 20 Bigha 10 Biswa
- (iv) Land falling in Khasra No.94 – 18 Bigha 1 Biswa
(both lands falling in Village Sukhwasi of Taranagar Tehsil)

3. The suit was contested by Allahdeen. He filed a written statement taking objection to the effect that land falling in Khasra No.122 measuring 23 Bighas 8 Biswas of Taranagar, land falling in Khasra No.93 measuring 20 Bighas 10 Biswas and land falling in Khasra No.94 measuring 18 Bighas 1 Biswa of Village Sukhwasi of Tehsil Taranagar was Khatedari land of Nanaga. He claimed to be Khatedar of the said land being the adopted son of Nanaga. On the material controversy the trial court framed as many as 12 issues and recorded evidence. The suit was dismissed by the judgment and decree dated 1st March, 1973. the plaintiff preferred an appeal against the said judgment to the Court of Revenue Appellate Authority, Bikaner. In the opinion of the Revenue Appellate Authority there was no sufficient proof of custom of adoption. In view of the finding the learned Revenue Appellate Authority

remanded the matter to the Assistant Collector, Rajgarh. After the remand some more witnesses were examined by the parties. While dealing with Issue No.4 the trial court held that the suit land was initially entered in the revenue record in the name of Nanaga as Khatedar. The trial court dealt with the Issue No.5 in depth and detail. The English translation of Issue No.5 is as follows:

“Whether the respondent No.3 Allahdeen was the adopted son of Nanag and he being the sole heir the entire property in question devolved in him?”

4. After remand the 3rd defendant Allahdeen examined Nasir Khan as D.W.6, Fateh Mohd. D.W.7 and Noor Mohd. D.W.8. It may be stated that initially he had examined himself as D.W.1, D.W.2 Abdula, D.W.3 Aladeen, D.W.4 Ibrahim and D.W.5 Karim. The defendant also produced certain documents including the adoption deed. On appreciation of oral and documentary evidence the trial court held that the contesting defendant has failed to establish that he was the adopted son of Nanag, thus, decided the Issue No.5 against the defendant. The trial court by judgment dated 28.12.85 decreed the suit holding that the plaintiff was entitled to 1/5th share in the suit property.

5. The contesting defendant Allahdeen preferred an appeal against the said judgment and decree in the court of Revenue Appellate Authority, Bikaner. The learned Revenue Appellate Authority specifically addressed himself on the Issue as to whether amongst Muslims there is a custom of adoption. It would be convenient to extract the question posed by the learned Revenue Appellate Authority as follows:-

"अब प्रश्न यह उठता है कि क्या मुसलमानों में मुस्लिम विधि में गोद जाने को मान्यता प्राप्त है अथवा नहीं। "

6. On re-appreciation of oral and documentary evidence the court held that there prevailed the custom of adoption amongst Muslims of Tara Nagar and the contesting defendant Allahdeen was adopted as his son by Nanag. The relevant finding is extracted as follows:-

"ऐसी स्थिति में अपीलान्ट द्वारा प्रस्तुत गवाहों को शहादत से स्पष्ट है कि अपीलान्ट नानग के गोद गया था और उनके अर्थात् नानग व अलादीन के यहां गोद लेने व गोद जाने की प्रथा रही है। अतः अधीनस्थ न्यायालय द्वारा तनकी संख्या -5 का निर्णय साक्ष्य के विपरीत किया गया है जो निरस्त किया जाता है।"

7. Thus, the trial court held that land falling in Khasra No.122 measuring 23 Bighas 8 Biswas, land bearing Khasra No.93 measuring 20 Bighas 10 Biswas and land of Khasra No.94 measuring 18 Bighas being the

Khatedari land of Maula Bux available for partition. In view of the finding the learned Revenue Appellate Authority accepted the appeal by judgment dated 20th September, 1986 and set aside the judgment and decree dated 28.12.85 passed by the learned Assistant Collector.

8. The plaintiff Jayan Mohd. challenged the order of the Revenue Appellate Authority, Bikaner by way of second appeal before the Board of Revenue, Ajmer. The Division Bench of the Board of Revenue held that by virtue of custom, the Mohammedan also have the system of adoption. After recording the said finding the learned Members of the Board of Revenue proceeded to analyse the evidence if the contesting defendant succeeded in establishing that he was the adopted son of Nanag. The Division Bench of the Board held that irrespective of the fact that witnesses in their statements has averred that custom of adoption was prevalent in their community but no independent witness like Maulvi or Kazi of the area or other respected elders of the community were examined. In absence of independent witnesses, the contention of the respondent Allahdeen cannot be accepted. It would be

convenient to extract the finding of the Board of Revenue as follows:-

"We are of the view that it was for respondent No.1 Alladin to prove that the custom of adoption was prevalent amongst his community i.e. amongst Neelgar Muslims of Taranagar Tehsil. Although a categorical issue to this effect was not framed yet, **the witnesses of respondent No.1 Alladin viz. Kamruddin(DW-4), Nasir Khan (DW-6), Fateh Mohd.(DW-7) and Noor Mohd.(DW-8) in their statements have averred that the custom of adoption was prevalent in their community. No independent witness like the Maulvi or Kazi of the area or other respected elder of the community, however, were called to tender their evidence on this important point.** In the absence of independent witnesses the contention of respondent No.1 Alladin that the custom of adoption was prevalent in his community cannot be accepted. Adoption is recognised by Mohammedan Law as an exception rather than the rule and consequently the prevalence of this custom has to be proved beyond any shadow of doubt."

9. The Board held that the courts below have failed to examine the crucial question about the prevalence of the custom of adoption in the Neelgar Muslims of Tara Nagar Side. In the opinion of the Board of Revenue the trial court should have framed a specific issue to that effect. In view of the finding the Board of Revenue by its judgment dated 26.10.1993 set aside the judgment

of the Revenue Appellate Authority as well as of the Assistant Collector and remanded the case back to the trial court with the direction that he should frame a new issue viz.

“Whether the practice and custom of adoption was prevalent amongst the Neelgar Muslims of Taranagar Tehsil?”

10. The trial court was directed to give opportunity to both the parties to adduce their evidence regarding the said issue and decide the same in accordance with law. The contesting defendant Allahdeen challenged the judgment of the Board of Revenue by way of filing writ petition before this Court. The learned Single Judge disagreed with the view of the Board of Revenue to the extent that the independent witnesses like Maulvi and Kazi were not examined. The learned Judge observed that the oral evidence adduced by the defendant could not be discarded solely on the ground that no Maulvi or Kazi or a respected elder of the community has been produced. The Court further observed that no adverse inference can be drawn simply because of non-production of certain other witnesses, who according to the Board of Revenue may have been desirable to be produced. The learned Single Judge noticed that the

evidence led by the petitioner about the factum of adoption consist of the persons who reside in the locality and has seen with close quarters the family of the Nanag and the petitioner. Their evidence if credible otherwise cannot be discarded merely on the basis that other more desirable evidence has not come on the record. The learned Single Judge further held that the Revenue Appellate Authority was right in holding to the contrary that requirement of any documentary proof is not essential to prove the custom of adoption. The learned Single Judge criticised the finding of the Board of Revenue observing,

“that finding of the Board in my opinion was wholly unwarranted when the learned Board of Revenue has reached its conclusion that the parties have not led evidence about existence of the custom which was necessary to be proved by the parties to further enquiry in the adoption whether it is in accordance with the custom prevailing.”

11. However, the learned Single Judge dismissed the writ petition directing the trial court to decide newly framed issue after permitting the parties to lead evidence.

12. We have heard learned counsel for the parties and

perused the relevant documents on record. We are of the view that instant appeal deserves to be allowed. It is not in dispute that the subject suit was filed as back as in the year 1972 i.e. 34 years back. The remand would necessarily have the effect of keeping alive the strife between the parties and prolonging this long drawn litigation by another round of legal battle in the trial court and thereafter in appeal and so on. It is required to be considered that if the final curtain can be put to an end to this long meandering course of litigation between the parties. Khanna J. in **Bechan Pandey & Ors. vs. Dulhin Janki Devi & Ors.** reported in AIR 1976 SC 866 has quoted the observation of its earlier decision in **Sant Kumar Mathur vs. Ram Krishna Mission** reported in AIR 1974 SC 2241,

"It is time, in our opinion, that we draw the final curtain on this long drawn litigation and not allow its embers to smoulder for a further length of time, more so when the principal contestants have all departed bowing as it were to the inexorable law of nature. One is tempted in this context to refer to the observations of Chief Justice Crewe in a case concerning peerage claim made after the death without issue of the Earl of Oxford. Said the learned Chief Justice:

"Time hath its revolutions; there must be a period and an end to all temporal things – an end of names, and dignifies

and whatsoever is terrence, and why not of De Vere? For where is Bohun? Where is Mowbray? Where is Mortimer? Why, which is more and most of all, where is Plantagenet? They are all entombed in the urns and sepulchers of mortality. What was said about the inevitable end of all mortal beings, however eminent they may be, is equally true of the affairs of mortal beings, their disputes and conflicts, their ventures in the field of love and sport, their achievements and failures for essentially they all have a stamp of mortality on them."

13. In Bechan Pandey's case the Apex Court further observed that the courts **should be loath to entertain a plea in a case like the present which would have the effect of condemning succeeding generation of families to spend major part of their lives in protracted litigation.**

14. In **K.Krishna Reddy & Ors. vs. The Special Dy.Collector, Land Acquisition Unit-I LMD Karimnagar, Andhra Pradesh** reported in AIR 1988 SC 2123 the Apex Court observed that **no useful purpose would be served by remand and the issue can be decided on admitted facts. The empty formality must be eschewed to advance the cause of justice.** A similar view has been taken by the Apex

Court in **Bhairab Chandra Nandan vs. Raanadhir Chandra Dutta** reported in AIR 1988 SC 396. Recently the Apex Court in **Sayed Akhtar vs. Abdul Ahad** reported in AIR 2003 SC 2985 held that even if no specific issue has been framed on the controversy but the perusal of the judgment shows that the parties were not only aware about the issue but also adduced evidence, made their respective submissions and if no prejudice is caused, it is not proper to remand the case. The Apex Court while making the aforesaid observation followed its earlier decision in **Kameshwaramma vs. Subba Rao** reported in AIR 1963 SC 884.

15. In the instant case, it is evident that the Revenue Appellate Authority by its judgment dated 1.3.76 remitted the matter to the trial court with the specific direction to address on the question of prevailing of custom of adoption amongst Muslims of Tara Nagar and decide the same after giving opportunity to both the parties for leading evidence. Instead of framing an additional issue the trial court expanded scope on Issue No.5, which was not objected to by either of the parties. The additional evidence was produced by the parties. The trial court recorded a finding against the

contesting defendant Allahdeen. The Revenue Appellate Authority specifically addressed on the issue about prevailing of custom of adoption amongst the Mohammedans. On appreciation of oral and documentary evidence the learned Revenue Appellate Authority decided this issue in favour of the contesting defendant. We have extracted the finding thereon in the earlier part of our judgment. The finding of the Revenue Appellate Authority was reversed by the Board of Revenue only on a short ground that the independent witnesses like Kazi or Maulvi or a respected elder person was not examined. This finding has been reversed by the learned Single Judge. We are in agreement with the learned Single Judge that the evidence produced by the contesting defendant cannot be discarded merely on the basis that other more desirable witnesses i.e. like Kazi or Maulvi should be brought on record. The case cannot be remanded simply on the ground that some more desirable evidence can be brought. It is the consistent view of this Court that an order of remand is bad when it is made on most superficial and cursory view of the matter. We have no hesitation in observing that the members of the Board of Revenue constituting the Division Bench have taken a

superficial and cursory view in the matter in remanding the case.

16. There is no controversy between the parties that adoption is not an absolute anathema to the Muslim community in Rajasthan. Undoubtedly, the Muslim Law in its pure form governed of Shariyat or Hidayah does not recognise the principle of adoption. However, where-ever there exist a custom amongst the Muslim community whether by way of a family custom or by way of community custom or by way of regional custom permitting adoption amongst Muslims, such adoption has been recognised by the courts in India. The contesting defendant has produced evidence with respect to the prevailing custom of adoption in their community. D.W.6 Nasir Khan a Sunni Musalman deposed that amongst Mohammedans there is a custom of adoption. He further stated that his father Gulab Khan had come in adoption of his elder father (Tau). He further stated that taking a son in adoption has been a custom in their community since immemorial. He further stated that many of their customs are similar to Hindus. The statement of D.W.7 Fateh Mohd. is almost on the similar line. He stated that his son Jhhumar had

gone in adoption. Similar is the statement of D.W.8 Noor Mohd. He stated that the custom of adoption has been in their community since immemorial. He has given number of instances, where a son had gone in adoption. That apart there is overwhelming evidence of contesting defendant Allahdeen being adopted by Nanag. Thus, the parties sent to the trial and adduced the evidence with respect to issue of adoption and custom. In our mind, there was no need of remanding the matter to the trial court. The Board of Revenue was in error in remitting the matter to the trial court. The learned Single Judge has committed error in confirming the order of the Board of Revenue.

17. Consequently, the appeal is allowed. The order of the learned Single Judge dated 18.11.2002 is set aside. The writ petition is allowed. The judgment of the Board of Revenue dated 26.10.93 is set aside. No order as to cost.

(R.P. VYAS), J.

(N.N.MATHUR), J.